IN THE HIGH COURT OF BOMBAY AT GOA.

WRIT PETITION NO. 294 OF 2003.

1. Mr. Vishwas Yeshwant
   Vaingankar, r/o 'Richfield'
   Housing Cooperative Society,
   1st Floor, Feira Alta,
   Mapusa.
2. Mrs. Chaya Vishwas Vaingankar,
   r/o 'Richfield' Housing
   Cooperative Society,
   1st Floor, Feira Alta,
   Mapusa. ... Petitioners.

Versus

1. Mrs. Helena Mascarenhas e
   Souza Ticlo, r/o H. No.
   188/13, Rua St. Jeromino,
   Mapusa.
2. Mr. Vito e Souza Ticlo,
   r/o H. No. 188/13, Rua
   St. Jeromino, Mapusa. ... Respondents.

Mr. S.D. Lotlikar, Senior Advocate with Mr. A.D. Bhobe, Advocate for the Petitioners.

Mr. J.E. Coelho Pereira, Senior Advocate with Mr. V. Braganza, Advocate for the Respondents.

Coram : F.I. REBELLO, J.

Date : 7th August 2003.

ORAL JUDGMENT.

Rule. Respondents waive service. Heard forthwith.

2. The petitioners by the present petition have impugned the Order, dated 21st February 2003, of the trial Court, closing the evidence of the petitioners herein. The Trial Court by the impugned Order on 21st February 2003, as can be seen from the roznama entry, recorded that the counsel for the plaintiff was present, that the petitioner no. 1/defendant was present in person, the petitioner no. 1 did not file his affidavit by way of examination-in-chief and, accordingly, closed the evidence. The record would show that subsequently

an application was taken out by the petitioners herein, which is dated 17th April 2003. By that application, the petitioners herein had prayed that the roznama Order, dated 21st February 2003, closing the evidence of the defendants be set aside and the defendants be allowed to lead their evidence. The application was opposed by the respondents. The trial Court, for the reasons recorded in Order, dated 4th June 2003, rejected the application and upheld the objections as raised on behalf of the respondents herein that as the petitioners had taken more than three adjournments, there was no discretion in the Court to grant further time. The petitioners have not challenged this subsequent Order. The effect of this can be considered in the course of discussion.

3. On behalf of the petitioners, their learned counsel points out that if Order XVII, Rule 1 is correctly read, it does not mean that the Court ceases to have jurisdiction to grant time. In the instant case, it is pointed out that from the subsequent Order, it is clear that the trial Court was inclined to grant adjournment but that was only rejected because of objection raised on behalf of the respondents herein.

On behalf of the respondents, one Vito e Souza Ticlo has filed an affidavit opposing the reliefs as sought for by the petitioners in the present petition.

4. The record would show that the issues were settled on 25th March 1997. Evidence of the plaintiffs commenced and it was adjourned for cross on 25th September 2000. On that date, the petitioners' advocate

remained absent and the matter was adjourned to 17th October 2000. On that date also the petitioners' advocate remained absent and the evidence of the witness was closed. The matter was fixed for further evidence on 24th November 2000, on which date, the petitioners' advocate remained present and moved the Court for adjournment contending that he would move the necessary application for setting aside the order closing evidence on or before the adjourned date of hearing, which was 11th December 2000. On that day an application was moved for setting aside the Order and giving grounds. That application was dismissed by Order, dated 1st February 2001. The matter was posted for further evidence and for final arguments on 5th March 2001. On which date, an application was moved before the Court saying that they were moving the High Court. The matter was adjourned to 19th July 2001. On the adjourned date, neither the petitioners nor their advocate was present nor any Order was produced before the Court. The application moved by the petitioners, dated 5th March 2001, was dismissed by Order, dated 19th July 2001. A fresh application was moved being Civil Miscellaneous Application No. 377 of 2001 for setting aside the exparte Order and the ground given was that the petitioners were informed by their advocate that he was unable to appear in the Court as on that date though he had come to Panaji, he could not reach the Court at 10.45 a.m. due to a traffic jam. The matter had been fixed thereafter on 17th August 2001. Though the advocate for the petitioners appeared in Court no steps were taken to file an application for setting aside the exparte Order. An application was filed only on 11th September 2001. That application was also dismissed.

The respondents moved an application for amendment, which was granted. The petitioners once again moved an application for leading evidence, which was granted. On 21st June 2002 a last and final opportunity was given to the petitioners to lead evidence on 6th July 2002 at 2.30 p.m.. On that date, an application was moved for adjournment, which was allowed subject to costs. Matter was adjourned to 7th August 2002, on which date, it came to be adjourned as the Presiding Judge of the Court was sick and the matter stood adjourned to 17th August 2002. On that date, again an application for adjournment was made and as a last opportunity was posted on 6th September 2002. On 6th September 2002 the Presiding Judge was on leave and the matter was fixed for 17th September 2002. The Court did not take up the matter on that date and it was adjourned to 29th November 2002. On 29th November 2002, again the petitioners made an application praying that certain document be produced. Copies were given and matter was fixed on 12th December 2002. On 12th December 2002 certain documents were furnished and matter was posted for 21st December 2002, on which date, neither petitioners nor their advocate appeared and the matter was posted for 9th January 2003 for arguments. On that date, an application was again moved for time. Matter came up on 13th January 2003, on which date, again the petitioners and their advocate were absent. However, an application for production of original documents, which had been taken out, had been disposed off and the matter was posted for 21st March 2003 for defence evidence, on which date, again petitioners filed an application for time and the matter was adjourned by giving a last opportunity on 31st March 2003. On that date, again the petitioners did not file

their documents of evidence and, accordingly, the Court closed the evidence of the petitioners and the matter was fixed for final arguments on 17th April 2003.

In the Order, dated 4th June 2003, the record would show that the Court tried to persuade counsel for the respondents to concede to one more adjournment, which was rejected. It is in that count that the learned Judge proceeded to uphold the objection and dismissed the adjournment sought for.

5. With that I now propose to dispose of the real controversy consequent to the amendment of Order XVII, Rule 1 by the Act of 1999. Order XVII, Rule 1 as substituted reads as under:-

> "The Court may, if sufficient cause is shown, at any stage of the suit grant time to the parties or to any of them, and may from time to time adjourn the hearing of the suit for reasons to be recorded in writing:
>
> Provided that no such adjournment shall be granted more than three times to a party during hearing of the suit."

It is argued on behalf of the petitioners that the word 'shall' ought not to be read as imperative but considering that it is a procedural provision, the Court should read it in such a manner that it does not oust the jurisdiction of the Court from exercising discretion in a fit and proper case. What the learned counsel contends, therefore, is that the word 'shall' be read as 'may'. On the other hand, on behalf of the respondents, learned counsel contends that the rule as substituted if properly read confers a discretion on the Court to adjourn the matter from time to time. However, after

the hearing of the suit has commenced, by virtue of the proviso, such discretion cannot be exercised more than three times to a party. If this is correctly read, it is contended, that the discretion of the Court on cause being shown to grant adjournment cannot be more than three times. Once a party to the suit seeks adjournment more than three times, the Court ceases to have jurisdiction to exercise discretion. Any Order of the Court, therefore, would be without jurisdiction. It is further submitted that the object of the Amendment Act of 1999 and 2002 is to bring about a speedy disposal of the suits considering that the suits have been dragging on for over decades. The object by which Parliament has sought to amend the Code of Civil Procedure ought not to be defeated and the Court must, in the circumstances, read the word 'shall' as 'shall' and not as 'may'. It is, therefore, submitted that this Court ought not to interfere with the Order passed by the trial Court.

6. Provisions pertaining to procedure have been the subject matter of large number of Judgments by the Apex Court. Suffice it to say if the following paragraph in the case of **Owners and Parties interested in M.V. "Vali Pero" v. Fernandeo Lopez and others,** A.I.R. 1989 S.C. 2206 is reproduced as that in a nutshell would explain how the Court must construe procedural provisions:-

> " Rules of procedure are not by themselves an end but the means to achieve the ends of justice. Rules of procedure are tools forged to achieve justice and are not hurdles to obstruct the pathway to justice. Construction of a rule of procedure which promotes justice and prevents its miscarriage by enabling the Court to do justice in myriad situations, all of which cannot be envisaged,

> acting within the limits of the permissible construction, must be preferred to that which is rigid and negatives the cause of justice. The reason is obvious. Procedure is meant to subserve and not rule the cause of justice. Where the outcome and fairness of the procedure adopted is not doubted and the essentials of the prescribed procedure have been followed, there is no reason to discard the result simply because certain details which have not prejudicially affected the result have been inadvertently omitted in a particular case. In our view, this appears to be the pragmatic approach which needs to be adopted while construing a purely procedural provision. Otherwise, rules of procedure will become the mistress instead of remaining the handmaid of justice, contrary to the role attributed to it in our legal system."

The amended Rule, considering it a procedural rule, will have to be considered on the touchstone of the law as explained by the Apex Court. In construing the Statute, I once again may advert to what the Apex Court has stated in the case of **Commissioner of Income-Tax, Bangalore v. J.H. Gotla**, A.I.R. 1985 S.C. 1698. There it was the provisions of the Income-Tax Act. The Apex Court observed as under:-

> " Where the plain literal interpretation of a statutory provision produces a manifestly unjust result which could never have been intended by the legislature, the Court might modify the language used by the legislature so as to achieve the intention of the legislature and produce a rational construction. The task of interpretation of a statutory provision is an attempt to discover the intention of the Legislature from the language used. It is necessary to remember that language is at best an imperfect instrument for the expression of human intention. It is well to remember the warning administered by Judge Learned Hand that one should not make a fortress out of dictionary but remember that statutes always have some purpose or object to accomplish and sympathetic and imaginative discovery is the

surest guide to their meaning."

In **Ganesh Prasad Sah Kesari and another v. Lakshmi Narayan Gupta,** A.I.R. 1985 S.C. 964, the issue before the Apex Court was of striking of the defence on the failure by the tenant to comply with the requirements. The language used was the word 'shall'. The Court considered the object with which the rent legislations had been enacted and it is in that context purported to interpret the expression. The Court observed that "ordinarily the use of the word 'shall' prima facie indicates that the provision is imperative in character. However, by a catena of decisions, it is well established that the court while considering whether the mere use of the word 'shall' would make the provision imperative, it would ascertain the intendment of the legislature and the consequences flowing from its own construction of the word 'shall'. If the use of the word 'shall' makes the provision imperative, the inevitable consequence that flows from it is that the Court would be powerless to grant any relief even where the justice of the case so demands. If the word 'shall' is treated as mandatory, the net effect would be that even where the default in complying with the direction given by the Court is technical, fortuitous, unintended or on account of circumstances beyond the control of the defaulter, yet the Court would not be able to grant any relief or assistance to such a person. Once a default is found to be of a very technical nature in complying with the earlier order, the Court must have power to relieve against a drastic consequence all the more so if it is satisfied that there was a formal or technical default in complying with its order." The Apex Court then relied upon its own Judgment in the case of

Govindlal Chagganlal Patel v. Agricultural Produce Market Committee, Godhra, A.I.R. 1976 S.C. 263 and quoted the following passage therefrom:-

> " The question as to whether a statute is mandatory or directory depends upon the intent of the legislature and not upon the language in which the intent is clothed. The meaning and intention of the legislature must govern, and these are to be ascertained, not only from the phraseology of the provision, but also while considering its nature, its design and the consequences which would follow from construing it the one way or the other."

These therefore, will be the tests which the Court will have to consider while considering the procedural provision like Order XVII, Rule 1. Ordinarily rules of procedure will apply as soon as they are enforced or come into force. In other words they would also apply to pending proceedings if not to proceedings which have been filed after the Amendment has come into force. Insofar as Order XVII, Rule 1 is concerned, Section 32(s) of the Amended Act is the repealing and saving clause which reads as under:-

> "32(s) the provisions of rule 1 of Order XVII of the First Schedule, as amended by section 25 of this Act, shall not affect any adjournment granted by the Court and any cost occasioned by the adjournment granted by the Court before the commencement of section 25 and the number of adjournments granted earlier shall not be counted for such purpose."

Parliament, therefore, knowing fully well that the provisions of Rule 1, Order XVII would apply, has chosen to exclude the adjournments already granted before the coming into force of the Act of 1999 on 1st July 2002. This also will have to be borne in mind while considering as to how the Rule must be read.

The second aspect is the Proviso to the main

Rule. It is now well settled that a Proviso inserted in the Rule would be either to explain the Rule itself or it carves out an exception to the main provision to which it has been enacted as a proviso. In the instant case, it clearly is an exception to the main rule. The question however will still have to be answered if the word shall in the proviso has to be read as 'may'.

7. Insofar as the expression 'the date of hearing' as used in the proviso to Order XVII, Rule 1 for the purpose of interpretation, gainful reference may be made to the Judgment of the Apex Court in **Rakesh Wadhwan and others v. M/s. Jagdamba Industrial Corporation and others,** 2002 SAR (Civil) 539. The Apex Court has held that the expression 'the date of first hearing' is the date on which the Court applies its mind to the facts and controversy involved in the case--Any date prior to such date would not be date of first hearing. The Court then observed that the date of framing of issues would be the date of first hearing when the Court has to apply its mind to the facts of the case. It is no doubt true that in the instant case what the Court was considering was the expression 'the date of the first hearing'. However, that would have the same meaning to be assigned even in the case of the expression 'hearing of the suit'. Hearing of the suit would commence from the framing of the issues. However, as framing of the issues is a duty cast on the Court, that date or the date at which the Court may adjourn for framing the issues, cannot be counted for the purposes of considering the three adjournments of hearing of the suit as has been set out in the Proviso. Therefore, the date of hearing would be the date on which the plaintiff

is called upon to lead his evidence. Insofar as the defendants are concerned, the date of hearing would be the date on which the defendants are called upon to lead their evidence. This interpretation would also follow in the main rule i.e.Order XVII Rule (1), the expression used as at any stage of the suit, one such a stage is filing of written statement. After the plaint is presented, the written statement has to be filed as contemplated in terms of Order VIII, Rule 1, wherein also a time limit is set out. In other words all these adjournments would be governed by the main Rule. This discretion to grant adjournment after issues are framed would be governed by the limitation as set out in the proviso. Therefore, the word hearing of the suit in the Proviso and the expression at any stage of the suit in the main rule will have to be read as the stage of the suit when the evidence of either the plaintiff or the defendant has to commence.

With this, another aspect of the matter may be considered. The three adjournments to be granted, as is commonly argued or perceived, is not as a matter of course. Granting of three adjournments is also within the discretion of the Court and only on a party showing sufficient cause for the adjournment and not as a matter of right. In other words, the Court is not bound to grant adjournment for the mere asking. Even when considering the Proviso, it will be open to the Court, if proper cause is not shown for the adjournment, to reject the application, even though it has discretion to grant three adjournments. The Court normally must see that justice does not suffer in granting or refusing adjournments, if, otherwise, the party has been diligent

in attending and pursuing the proceedings and without defeating the legislative intent.

8. That leaves me with the issue now as to the manner in which the expression 'shall' must be read in the Proviso. My attention has been invited to a Judgment of a learned Single Judge of the Andhra Pradesh High Court in **Nachipeddi Ramaswamy v. P. Buchi Reddy,** reported in 2003 (7) ILD-HC Reports 229, where the learned Single Judge of the Andhra Pradesh High Court - has taken a view that even in case of Order VIII, it would be still within the discretion of the learned Judge in a proper case to grant further time to file written statement. My attention was also invited to the Judgment of another learned Single Judge of the Karnataka High Court in **Sri Prasanna Parvathamba Vaidyanatheshwara Trust v. M.S. Radhakrishna Dixit,** 2003 (7) IDL-HC Reports 218, where again the learned Judge has taken the view insofar as Order VIII is concerned, that there is jurisdiction in the Court to grant time beyond what is prescribed in Order VIII. I am really not concerned with that issue nor do I propose to decide that issue. They have only being adverted to, as the learned counsel pointed out that atleast two High Courts have taken a view that the expression 'shall' should be read as 'may' and not 'shall'. My attention was then invited to another Judgment of a learned Single Judge of this Court in the case of Jagadev R. Pangam (deceased through legal heirs) v. Shivanand V. Salgaoncar and another, decided on 17th October 2002, in Writ Petition No. 298 of 2002. In that case admittedly the suit must had been filed in 1987, that is before 1st July 2002, an adjournment was sought on 31st July 2002

on the ground of sickness of the advocate. The trial Court in view of the amended provisions of the Code of Civil Procedure, considering that not more than three adjournments could be granted and as the three adjournments had already been granted came to dismiss the application. The learned Judge further adverting to the Rule observed that expression used was the word 'shall' and the same restricts the discretion of the Court to grant adjournments on more than three occasions to a party during the hearing of the suit. The learned Judge thereafter considered the merits of the matter and while disposing of the proceedings referred to the purpose for which the amendments were effected. On perusal of this Judgment, though the learned Judge has referred to the expression 'shall', in my opinion, it really cannot be said to have decided the issue in controversy. The ratio of the Judgment in Owners and Parties interested in M.V. "Vali Pero had to be applied and the tests laid down therein. Apart from that, to consider a ratio of the judgment the issue han to be in issue, the issue needs to be decided and the issue has been decided on cogent reasons. In the instant case apart from referring to the word 'shall' the learned Judge has not addressed himself to the various tests as laid down by the Apex Court where the word 'shall' has to be read as 'may'. In my view, therefore, the question is still open for consideration by this Court. Having said so, the question would then be whether considering the language the word 'shall' can be construed as 'may'. In favour of construing the word 'shall' is firstly the repealing provision itself. It sets out that adjournments granted earlier to coming into force of the amendment will not be considered.

Secondly the Proviso to Rule 1, which sets out that insofar as hearing of the suit is concerned, no such adjournments shall be granted more than three times to a party. In other words, though in the general rule there is no limitation on the number of adjournment, this discretion is now limited by the Proviso. Thirdly, the object with which the amendment has been brought out, namely, for a speedy disposal of the proceedings. If the Court however considers the expression used as 'shall', then there will be no jurisdiction in the Court to grant relief to a party in an appropriate and deserving case, if so occasioned. There could be a situation where at the time when three adjournments were granted the party or witness really falls sick and may not be available for reason beyond his control. In cases where an advocate is engaged such an advocate may not be available for reasons beyond the control of the party and may not be in a position to attend the Court. Considering the two illustrations and other similar situations, it will not be possible for this Court to relieve the litigant against palpable injustice? Once the word Shall is read as 'Shall' it will preclude not only that Court but even the Higher Court from granting time. If it is held that the Court will have no jurisdiction once the three adjournments are over, it will tantamount to saying that the clock stops there and even, considering that the provision is procedural, the Court cannot relieve the party from such injustice. The other aspect is that once there is a provision, then it will not be possible for the Court to exercise its inherent power under Section 151 for if the Code itself provides a remedy, then the power under Section 151, cannot be resorted to. In other words the Court willing

to relieve a party from injustice would be helpless and devoid of its jurisdiction to do justice. In that context, in my opinion, while construing a procedural provision as set out by Judge Learned Hand, one should not make a fortress out of the language more so of a procedural provision. The proper construction, therefore, would be that the Courts will still retain jurisdiction in such matters where it feels that a party should be relieved from injustice. A word of caution. It does not mean that once this Court holds that there is power in the Court to grant adjournment even after

three adjournments are exhausted, that those powers must be freely exercised by the Court. That power will only be exercised for reasons recorded. Such reasons could be that the Court finds that the ground for adjournment was necessited for reasons beyond the control of a party or the advocate and not a mere failure to lead evidence. Once a party exhausts the three available adjournments, granting an adjournment after that would lie entirely within the discretion of the Court as to costs and otherwise and it will only grant adjournment in those rare cases, which in the Court's opinion, if adjournment is not granted, will result in failure of justice and has not been occassioned by the parties failure, to take steps in the proceedings.

9. Having held that the expression 'shall' has to be read as 'may', on the facts of this case, is it possible for this Court to interfere with the impugned Order? The various dates on which adjournments had been sought have been set out. In my opinion, the learned Court was right on the facts of the present case to reject the application for re-calling the earlier Order.

10. Considering the above, rule discharged. There shall be no order as to costs.

(F.I. REBELLO)
JUDGE.

ed’s.